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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION

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RESPONSE TO BRIEF IN OPPOSITION

Respondents' brief in opposition[1] to writ of certiorari actually underscores, rather than detracts from, the need for this Court to review this case.

1. Respondents concede, as they must, that this case presents "an important question of federal law" (Opp. p. 10), but nonetheless urge that the record below is insufficient to enable consideration of whether Title VII of the Civil Rights Act of 1964 proscribes an employer's exclusion of coverage for pregnancy related disability from an income protection plan which covers disabilities arising from sickness and accident. Contrary to Respondents, however, the record below renders this case ideal for review; the sole issue involved is the validity

1. Herein "Opp.".

of Petitioner's disability and income protection plans as applied to pregnancy, and the record contains the entire disability and income protection plans of Petitioner, as well as extensive testimony fully explaining the operation of these programs. There is, significantly, *no* factual dispute whatsoever concerning Petitioner's disability and income protection plans, the coverage of their benefits, nor the application of those programs to pregnant employees. The issue of national importance involved in this case thus arises upon an undisputed factual record.

2. While Respondents urge that Petitioner has failed to come forward with "legally valid justification for exclusion [of coverage for pregnancy]" (Opp. p. 4), and has assertedly "refus[ed] to justify its practices on a cost . . . basis" (Opp. p. 10), it inconsistently also urges, as held by the Court of Appeals (Pet. App. p. A14), that cost would *not* be a permissible defense. In short, because the paramount issue here is whether—irrespective of cost justification—Petitioner's benefit policies as applied to pregnancy constitute proscribed sex discrimination, particularly in light of this Court's recent decision in *Geduldig* v. *Aiello,* 417 U. S. 484, 496 n. 20, (1974), which indicates that it does *not,* this case presents an ideal vehicle for review of this important question.[2]

3. Petitioner has, in order to present this Court only with the critical issue of increasing national prominence concerning the pregnancy benefits sex discrimination issue, specifically refrained from seeking review of other issues resolved against it by the Court of Appeals, e.g., the Company's previously abandoned mandatory leave policy for pregnant employees.[3]

2. Petitioner believes that *Aiello* is dispositive of the point that benefit exclusion on the basis of pregnancy is not discriminatory, whether occurring in the constitutional or statutory context. But even assuming that sex discrimination were established, the remaining legal issue, which mandates consideration by this Court, would pertain to establishment of standards for determining whether considerations such as cost could ever be asserted as a defense to the violation or, conversely, whether the violation would, in essence, be *per se.*

3. In their quest to confuse the issue, Respondents have significantly misstated the record. Thus, while they twice state that only women are subject to a mandatory point of return to work "without regard to the causes of the disability" (Opp. p. 9), it is wholly undisputed that the mandatory return rule applies *only* to pregnancy. In any event, however, the return policy is not presented to this Court for review.

4. Moreover, Respondents' wholly unexplained assertion (Opp. p. 4) that a decision favorable to Petitioner on the issues presented "automatically will validate those [other] practices as well," is a gross *non-sequitor.* Thus, for instance, while this Court found a mandatory leave policy applied to pregnancy unconstitutional in *Cleveland Board of Education* v. *La Fleur,* 414 U. S. 632 (1974), it specifically found a State's exclusion of pregnancy from coverage of disability benefits to be non-discriminatory and constitutionally permissible in *Aiello, supra.* Accordingly, while the validity of Petitioner's leave policy under Title VII is not presented herein, there is no force to Respondents' strawman contention that a decision finding the benefits exclusion lawful will necessarily control other issues not even involved in this appeal.

Yet Respondents extensively belabor those issues (Opp. pp. 2-4, 8) in an attempt to cloud the single issue presented for review to this Court.[4] Such considerations, it is submitted, are not pertinent.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Liberty Mutual Insurance Company respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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